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RECEIVED

June 14, 1996

JUN 14 1996

**Federal Communications Commission
Office of Secretary**

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: Notice of Inquiry and Notice of Proposed Rulemaking, GC Docket No. 96-55

Dear Mr. Caton:

Enclosed are an original and 10 copies of the Comments of Cincinnati Bell Telephone Company in the above referenced proceeding. A duplicate original of these Comments is also provided. Please date stamp this as acknowledgment of its receipt. Questions regarding these Comments may be directed to Mr. Robert J. Wentz at the above address or by telephone on (513) 397-1248.

Sincerely,

David L. Meier

cc: ITS

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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JUN 14 1996

In the Matter of)

Federal Communications Commission
Office of Secretary

Examination of Current Policy)
Concerning the Treatment of)
Confidential Information)
Submitted to the Commission)

GC Docket No. 96-55

COMMENTS OF CINCINNATI BELL TELEPHONE COMPANY

I. INTRODUCTION

Cincinnati Bell Telephone Company ("CBT"), an independent, mid-size local exchange carrier ("LEC"), submits these comments in response to the Commission's March 25, 1996 Notice of Inquiry and Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.¹ This NPRM was released to evaluate the Commission's practices and policies concerning the treatment of competitively sensitive information that has been provided to the Commission.²

Because of the increasing level of competition among telecommunications providers, the need for confidentiality of trade secret or other protected information submitted to the Commission has greatly increased. Accordingly, CBT is grateful for the opportunity to assist the Commission in its efforts to develop a workable policy to evaluate requests for confidentiality in Commission proceedings.

¹ In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, Notice of Inquiry and Notice of Proposed Rulemaking, GC Docket No. 96-55, FCC 96-109 released March 25, 1996.

² NPRM at 1.

I. GENERAL ISSUES

A. Whether the Commission Should Adopt A New Standard Regarding Confidentiality.

In the NPRM, the Commission has solicited comment regarding whether the "persuasive showing" for disclosure of confidential information provides adequate protection to a party submitting such information to the Commission.³ CBT respectfully suggests that such standard is no longer adequate in light of the current competitive environment and accordingly requests that the Commission adopt a higher threshold for disclosure. As the Commission recently observed,

In a competitive environment, disclosure of direct cost data carries a significant risk of competitive harm by providing competitors with information necessary to under-price a service or product.⁴

Once competitively sensitive information is released outside the Commission, the submitting company has no ability to control how the information is used or misused.

The risk that an unprincipled competitor will willfully flout a protective order is present in any protective order situation. In the instant proceedings, however, there is additionally a unique likelihood of inadvertent disclosure of information reviewed subject to a protective order which should impact the Commission's rules regarding the issuance of such orders. In the current fast-changing environment, replete as it is with corporate downsizing and experts-for-hire, the officer at a competitor who signs a protective order this month may well find himself marketing his telecommunications expertise as a consulting expert next month. The risk of

³ NPRM at ¶¶ 30-32.

⁴ In Re Intoccia FOIA Request, 10 FCC Rcd. 13462 (1995).

inadvertent transmission of confidential information in this environment is overwhelming. Since proof of violation of a protective order, especially inadvertent violation, is nearly impossible, while the damage from such violation can be devastating, CBT respectfully submits that the better course is for the Commission to determine that the new competitive environment has effected a fundamental change in the nature of tariff proceedings such that the public interest concerns that underlie the history of open tariff proceedings are now outweighed by the submitter's need to protect competitively sensitive information. Accordingly, CBT suggests that in the usual case, competitors' requests to review competitively sensitive information should be rejected.

Even in the rare circumstance where the Commission determines that the assistance of competitors to evaluate the lawfulness of a proposed tariff is a necessary supplement to the Commission's own expertise, CBT suggests that the Commission should not disclose confidential information directly to a submitter's competitors. Instead, if some level of disclosure is deemed to be unavoidable by the Commission, CBT suggests that the Commission offer the parties the opportunity to apply the procedure undertaken to protect the Bellcore proprietary Switching Cost Information System ("SCIS") computer model from disclosure during the investigation of the open network architecture tariffs.⁵ In that case, the Commission ordered submission of the confidential information to an independent auditor, rather than to the submitter's competitors, and devised a procedure whereby the competitors submitted questions to the auditor regarding the submitter's cost practices. Use of this procedure permitted the

⁵ In Re Commission Requirements for Cost Support Material to Be Filed With Open Network Architecture Access Tariffs, 7 FCC Rcd. 1526 (1992).

Commission to obtain the benefit of competitors' comments and concerns together with scrutiny of data under evaluation criteria proffered by those competitors without subjecting Bellcore to direct disclosure of its competitively sensitive information.

B. Model Protective Order.

The Commission has set forth a model protective order to govern circumstances in which the Commission determines that some disclosure of confidential information is necessary. As noted above, in those rare instances where input from competitors is deemed by the Commission as necessary to its determinations, CBT proposes that the submitter be given the option of submitting the information to an independent auditor to evaluate using criteria proposed by the competitors.

Nevertheless, CBT supports the development of a model protective order for those circumstances where all parties agree that some disclosure of information to competitors is acceptable. CBT suggests that the protective order which the Commission has attached should be modified to include the following provisions:

8. Five days before confidential information is disclosed to any Authorized Representative, the name and curriculum vitae of such representative shall be provided to the submitting party. If the submitting party has specific objections to the qualifications of the Authorized Representative to review the confidential information, such objections shall be made in writing within three days of notification and served on the Commission and the party proposing to provide information to the Authorized Representative. The objections shall be ruled on before any confidential information is disclosed.
9. In the event that the Commission determines that this Protective Order has been violated, the Commission shall order payment of \$_____ in liquidated damages to the submitting party. The Commission shall further enjoin the violating party for a period of six months from the date that a violation has been determined from competing with the injured party

in any activity in which the improperly obtained information could provide a competitive advantage.

C. Whether Different Standards Should Apply to Specific Proceedings.

The Commission has requested comment regarding whether the standards or rules that should be applied to requests for confidentiality should vary based on the nature of the proceedings. CBT believes that in order to avoid the consequences of "forum shopping," the same standard should apply in each type of proceeding.

If different standards are applied to different types of proceedings, one may reasonably anticipate that parties will modify their procedural tactics to minimize disclosure of their own information and maximize the opportunity to obtain competitors' information. For example, if the Commission determines that more information should be made available during a complaint process than during a tariff proceeding, interested parties will likely allow tariffs to go into effect with little challenge and then file a complaint. Likewise, if the Commission requires more open disclosure during rulemaking proceedings than in private proceedings, parties may withhold comment on the rules themselves and instead apply for special relief in a subsequent private proceeding. Accordingly, because of the likelihood that different levels of protection will simply result in a shift in the types of proceedings undertaken, CBT believes that no difference in protection offered dependent on the nature of the proceeding is appropriate.

D. Substantiating Confidentiality Claims.

The Commission suggests that it should adopt a policy requiring a party requesting confidential treatment to substantiate its request in order to avoid frivolous requests. CBT fully concurs with the Commission's suggestion. Specifically, CBT proposes that the Commission streamline the procedure for requesting confidentiality by requiring each request to be

accompanied by an affidavit by an officer of the submitting company. The affidavit should include the following under penalty of perjury:

1. A statement that the submitter has reviewed the submission and determined that it contains confidential information;
2. A statement that the submitter is enclosing with the request for confidentiality two versions of the submission -- one marked "Confidential" which contains the confidential information and one marked "Public Version" which contains all information from the confidential Version except that which has been specifically determined to be confidential;
3. A statement that the information concerns a service which is either subject to competition at the time of submission or which is expected to be subject to competition within one year of the time of submission;
4. An explanation of why disclosure of the information would result in substantial harm to the business' competitive position;
5. A description of the measures which the business has taken to prevent undesired disclosure of the confidential information to persons outside the business;
6. A description of the extent to which the confidential information has in fact been disclosed to persons outside the business; and
7. A statement regarding whether the information falls within a category set forth in 47 CFR 0.457(d).

CBT respectfully suggests that the Commission may reduce frivolous requests for confidential treatment by requiring such an affidavit to accompany confidentiality requests and by instructing the docket clerk to reject the filing of any confidentiality request which does not comply with this requirement.

With regard to the timeframe during which information is deemed to remain confidential, CBT does not believe that any considerations justify the burden on the Commission of establishing a policy to review information for release if it becomes "stale" and therefore no longer confidential. Accordingly, CBT proposes that once information is deemed confidential,

it should continue to be treated as such while it is in the Commission's files. Any challenges to the "staleness" of a confidentiality claim should be addressed on a case by case basis, with the submitter of the information being given notice and an opportunity to respond.

E. Timing of Ruling on Confidentiality Claims.

The Commission has suggested that confidentiality claims need not be ruled on unless a party contests the validity of such a claim. CBT concurs with this analysis. Moreover, CBT suggests that if the Commission requires the affidavit suggested in Section II.D to be attached to requests for confidentiality, then such requests may be presumed granted once the filing is accepted by the docket clerk.

The Commission has noted that in the context of tariff proceedings, when confidentiality requests are challenged, such challenges may not be resolved within the statutory time frame for resolving tariff issues under the Telecommunications Act of 1996.⁶ CBT notes that in the new competitive environment, the risk of abuse of challenges to confidentiality requests is a greater threat to the smooth operation of Commission proceedings than the risk of abuse of the requests themselves. Accordingly, CBT respectfully suggests that the Commission issue rules which direct tariff proceedings to move forward on the timetable provided in the Telecommunications Act of 1996 without regard to the resolution of challenges to confidentiality requests. Any further action necessary as a result of the rare successful challenge to such requests could be resolved subsequent to the tariff taking effect.

⁶ NPRM at ¶¶ 43-44, citing §402(b) of the Telecommunications Act of 1996.

F. Challenges to Requests for Confidentiality.

CBT believes that adoption of the procedures set forth in Section II.D, above, will avoid frivolous requests for confidentiality and consequently will minimize the number of challenges to confidentiality requests. However, CBT recognizes that the Commission will likely wish to adopt a procedure for resolving such challenges.

The primary focus of a proceeding challenging a request for confidentiality must be notice to all interested parties together with an opportunity to be heard.⁷ In today's environment, where a party requesting information is more likely to be a potential competitor than a potential customer, the challenging party should be required to demonstrate that failure to disclose the specific requested information would undermine the fundamental integrity of the Commission proceeding at issue. Challenges to confidentiality should not be permitted merely to allow a party to re-calculate a proposed tariff rate or to comment generally on a proposed service.

In the event that a challenge to a request for confidentiality is successful, CBT proposes that the Commission adopt safeguards to minimize the impact of disclosure of sensitive information. CBT proposes that if the Commission orders disclosure of confidential information after a challenge to a confidentiality request, the Commission give the submitting company an opportunity to propose alternatives to disclosure, such as:

⁷ CBT notes that the proprietary information at issue in a confidentiality request is sometimes not owned by the submitter of the information. Instead, frequently the submitter requests confidentiality on behalf of a third-party, such as Bellcore, who has no interest in the merits of the Commission proceeding. In such cases, such as the SCIS proceeding referenced above, the owner of the information must have the opportunity to protect its proprietary product.

1. submission of the information to an independent auditor, such as in the SCIS proceeding discussed above;⁸
2. withdrawal of the information if it was voluntarily submitted;
3. revision of the filing to address the challenge in a way which does not reveal the confidential information;
4. withdrawal of the related tariff, where the information relates to a tariff request by the submitting company.

G. Aggregated or Sanitized Information.

CBT believes that the Commission's concern that compilations of industry-wide data and other sanitized documents may inadvertently reveal confidential information (NPRM at ¶ 59) is valid. CBT respectfully suggests that the Commission's rules should be amended in order to incorporate procedures to avoid inadvertent damage through such disclosure.

By way of example, CBT notes that it is a relatively small carrier serving a single geographic area. Accordingly, an industry wide survey which details cost structures by state and by carrier-size would provide competitors with full access to CBT's confidential information even though specific details such as CBT's name or city were withheld.

In order to prevent inadvertent disclosure of confidential information through such reports, CBT proposes that the Commission adopt a rule which would give all providers of confidential information 60 days advance notice that such a report would be issued, together with an exemplar of the anticipated format of the report. Such rule should permit any party who believes that its confidential information will be inappropriately disclosed by the issuance of the

⁸ See note 5 and accompanying text.

report to submit, 30 days prior to issuance of the report, an affidavit to the Commission explaining how the proposed format would disclose its confidential information along with a proposed revision of the format to avoid the anticipated harm.


The procedure proposed by CBT would allow each provider of information to evaluate whether a proposed report would disclose the provider's confidential data or information without imposing an undue burden on the Commission and without inappropriately delaying issuance of useful data compilations and reports.

III. CONCLUSION

CBT respectfully requests the Commission to consider these comments as it develops a policy against which to evaluate requests for confidential treatment of information provided to it in the course of tariff applications and other proceedings.

Respectfully submitted,

FROST & JACOBS

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